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In the Supreme Court of the United States

OCTOBER TERM, 1977

AARON LAX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that his convictions should be reversed because there was an undisclosed plea agreement between the government and its key witness.

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of four counts of possession and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1), and was sentenced to concurrent terms of five years' probation, consecutive terms of three years' special parole, and, on each count, a fine of $25,000. The court of appeals affirmed three of the counts and vacated sentence on the fourth (Pet. App. A).[1]

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[1] A separate fine of $3,730, payable to the State of California for investigative costs, was also vacated.

1. The evidence showed that Leonard Grossman, the government's main witness at trial, had been arrested in 1975 by DEA agents for selling a pound of cocaine (Tr. 193, 196, 362-363, 371, 533-534). In February 1976, petitioner, a physician, asked Grossman, who was his patient and who had received the cutting agent procaine from petitioner on prior occasions, what he paid for cocaine (Tr. 433-434). Grossman notified DEA agents of this exchange (Tr. 36, 51). Thereafter, equipped with a body radio transmitter (Tr. 15-17, 315), Grossman went to petitioner's office; in a recorded conversation Grossman ordered an ounce of pure cocaine from petitioner (Gov't Exhs. 1, 8-A). Four days later, in a recorded telephone call, Grossman and petitioner agreed to meet that afternoon for delivery of the cocaine (Gov't Exhs. 2, 9; Tr. 335-337). Grossman, again wearing a body recorder (Gov't Exhs. 3, 10-A), picked up 25 grams (slightly less than an ounce) of pure nonpharmaceutical cocaine (Gov't Exh. 15; Tr. 174-176, 296-298), paying petitioner $1800 for it (Tr. 341, 345). They discussed the quality and availability of the cocaine, and petitioner told Grossman how to weigh and cut it. The next day Grossman again visited petitioner at his office, and in another recorded conversation (Gov't Exhs. 4, 11-A) they discussed the quality of the cocaine purchased the day before.

The following week Grossman ordered another ounce of cocaine (Gov't Exhs. 5, 12-A; Tr. 348), which he picked up the next day, paying petitioner $1800 for it (Gov't Exh. 16; Tr. 108, 174-176, 296-298, 351).

In his own defense, petitioner testified that he had prescribed procaine, amphetamines, and tranquilizers as a means of treating Grossman's anxieties, insomnia, and addiction (Tr. 741-742, 753-765). Petitioner admitted selling an ounce of cocaine to Grossman, but said that Grossman was addicted to the drug and had threatened to

turn to heroin if he could not obtain cocaine (Tr. 770-795). Petitioner also attempted to discredit Grossman and impeach his credibility. Grossman's former wife testified that he was a pathological liar (Tr. 626-631). Petitioner also elicited evidence that Grossman was a drug user and dealer (Tr. 277-278, 437-440, 444-446, 457-460, 529-530) and that he had testified in order to avoid serving any time in prison (Tr. 49, 56, 375-380, 382, 387, 442-444, 455, 520).

2. Seven months before petitioner's trial, Grossman had pleaded guilty to the charges stemming from his original arrest; the government promised that, in return for his cooperation in the case against petitioner, it would drop other charges and recommend probation. Grossman testified as to this agreement (Tr. 307-308) and was vigorously cross-examined on it (Tr. 360-363, 442-444, 454-455).

At the conclusion of trial, petitioner moved for a judgment of acquittal, alleging that the prosecutor had failed to disclose an essential element of the plea agreement between Grossman and the government, namely, that Grossman could withdraw his plea if the court refused to accept the recommendation of probation. Petitioner further charged that Grossman perjured himself at trial when, in response to defense questioning, he denied the existence of such a provision in the agreement. Petitioner also contended that the government knowingly permitted Grossman to lie, and that the false testimony could have affected the judgment of the jury. At the hearing, petitioner's counsel admitted that he knew of the existence of this provision of the agreement (Sent. Tr. 7). The district court denied petitioner's motion, finding that all parties understood that Grossman could withdraw his plea if sentenced to a term of incarceration. The court further found that, because defense counsel

knew of this understanding, petitioner was not prejudiced by any non-disclosure. The court concluded that Grossman's testimony was not perjurious in light of the ambiguous phrasing of the questions (Sent. Tr. 3-19).

The court of appeals, upon reviewing the trial record and the minutes of Grossman's guilty plea, concurred in the factual finding that there was no failure to disclose the plea agreement. It further found that even if the government had withheld the plea agreement terms, petitioner had made only a "general request" for discovery materials, that the failure to disclose this evidence would be reversible only if the evidence would have created a reasonable doubt as to petitioner's guilt, and that there was no such doubt on this record (Pet. App. A 5).

Petitioner claims that the decision below is in conflict with decisions of other circuits and that the court used an improper standard in evaluating the materiality of the evidence relating to the plea agreement with Grossman. These contentions are not well taken on this record, because the affirmance is based upon the express factual finding of both courts below that the terms of the agreement were properly disclosed before trial and there is no "very obvious and exceptional" showing of error. *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635. See also *United States* v. *Ceccolini,* No. 76-1151, decided March 21, 1978, slip op. 4, 5. For the same reason, this case does not properly present the conflict among the circuits alleged by petitioner regarding the interpretation of *United States* v. *Agurs,* 427 U.S. 97.

In any event, even if petitioner were correct in alleging that the prosecutor knowingly withheld evidence and permitted Grossman to perjure himself, the standard of *Giglio* v. *United States,* 405 U.S. 150, 154—the validity of which petitioner does not challenge (Pet. 13)—is that a

new trial is required if "the false testimony could * * * in any reasonable likelihood have affected the judgment of the jury * * *." That standard does not support reversal here. Petitioner launched a lengthy and broad-based attack on Grossman's credibility at trial, and repeatedly referred during the trial and summation to Grossman's vested interest in avoiding prison by testifying against petitioner—an interest that would not be materially affected by the right reserved to Grossman to withdraw his plea. Moreover, the other evidence at trial, including the recorded conversations, convincingly established petitioner's guilt, and there is no "reasonable likelihood" that, had the jury been informed that Grossman could withdraw his guilty plea and proceed to trial, petitioner would have been acquitted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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